Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-913

WILLIAM FISHER, M.D.,

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

WILLIAM FISHER, M.D.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner, William Fisher, M.D., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which was rendered on September 29, 1976.

Opinions Below

The United States Court of Appeals for the Fifth Circuit affirmed the judgement of the Trial Court without opinion pursuant to Fifth Circuit Rule 21. The *Per Curiam* is annexed hereto at Appendix A.

There were no written opinions of the United States District Court

for the Eastern District of Louisiana with respect to either of the issues presented by this petition for a writ of certiorari. Honorable James A. Comiskey, United States District Judge, entertained Petitioner's motion to dismiss the indictment and denied that motion on May 14, 1975. (Document 26, R. 69.) A copy of that Minute Entry is annexed hereto as Appendix B. Honorable Fred J. Cassibry, United States District Judge, presided the trial and post-trial district court proceedings in this matter. Judge Cassibry denied Petitioner's motion for a new trial grounded on the failure to disclose valuable evidence affecting the credibility of a "key" Government witness, Dr. George L. Bailey, on October 23, 1975. A copy of the Minute Entry is annexed hereto as Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 29, 1976 (*post*, Appendix A). A timely petition for rehearing and for rehearing *en banc* was denied on December 1, 1976. A copy of the Notice of the denial of the petition for rehearing is annexed hereto as Appendix D. The mandate of the United States Court of Appeals for the Fifth Circuit issued on December 9, 1976, a copy of which is annexed hereto a s Appendix E. On December 10, 1976, a motion for Stay of Mandate pending the filing of this Petition for Certiorari was filed in the United States Court of Appeals for the Fifth Circuit. The motion for a stay was denied by Honorable Thomas Gibbs Gee, United States Circuit Judge, on December 13, 1976, a copy of which order is annexed hereto as Appendix F. A motion for reconsideration of the denial of the motion to recall the mandate and to stay issuance of the mandate pending timely application to this Court for a writ of certiorari is now pending.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1). See also, Supreme Court Rule 19(1)(b).

Questions Presented

1. Whether the Court of Appeals erred when it affirmed the ruling of the Trial Court refusing to grant Petitioner a new trial when the

prosecutor withheld information from the defense which would have vitally affected the credibility of the Government's "key" witness, Dr. George L. Bailey, who another prosecutor informed the trial prosecuting attorney was a victim of the land fraud scheme in which Dr. Bailey had lost $75,000.00, and he was attempting to get the Federal Government's assistance in obtaining restitution of that money.

2. Whether the Court of Appeals erred when it affirmed the ruling of the Trial Court denying Petitioner's motion to dismiss the indictment on the ground that 21 U.S.C. Sec. 841 (a)(1), as applied, is unconstitutionally vague.

Statutory Provisions and Regulations Involved

21 U.S.C. Sec. 841 (a)(1) provides, in relevant part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ---
>
> (1) to *** distribute, or dispense *** a controlled substance ***.

21 U.S.C. Sec. 822 (b) provides, in relevant part:

> Authorized activities
>
> (b) Persons registered by the Attorney General under this subchapter to *** distribute, or dispense such substances (including any such activity in the conduct of research to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

21 U.S.C. Sec. 821 provides:

> The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution and dispensing of controlled substances.

21 C.F.R. Sec. 1306.04 (a) (1974) provides:

A prescription for a contrilled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. Sec. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalities provided for violations of the provisions of law relating to controlled substances.

Statement of the Case

This is a criminal prosecution of a physician for dispensing and distributing Schedule II controlled substances. The p rosecution was brought in the trial court pursuant to 21 U.S.C. Sec. 841 (a)(1). The Trial Court had jurisdiction of this action pursuant to 18 U.S.C. Sec. 3231.

Dr. William Fisher was charged in a twenty-three count indictment with unlawfully dispensing and distributing and causing to be dispensed and distributed certain designated amounts of specified controlled substances. It was alleged that said acts were not in the usual course of professional practice and were not for a legitimate medical purpose. Dr. Fisher was arraigned and entered pleas of not guilty to each allegation of the indictment.

Dr. Fisher filed a motion to dismiss the indictment, urging that

> "The statute, if it is deemed to be applicable to 'a registrant authorized to dispense controlled substances,' is void for vagueness in that no standards are set forth in the said statute by which it may be determined when a medical doctor, qualified to order dispensation of controlled substances *via* prescription, has transcended the borders of medical professional propriety fixed by chemists and lawyers in the Justice Department of the United States Government."

(Document No. 21, R. 45)

This motion was denied by the Trial Court. Other pre-trial motions were filed, but are not made the subject of this petition.

In the course of the trial, the Government called three undercover agents and two physicians as witnesses against Dr. Fisher. The first undercover agent to obtain drugs from Dr. Fisher was George J. Cazenavette, who posed as Gregory Carlton. This agent sought amphetamine drugs to stay awake and a tranquilizing drug to reduce nervousness produced by the amphetamines. Dr. Fisher checked the patient's physical condition, his blood pressure, heart, weight and concluded that the patient's physical condition was good. He prescribed a months supply of amphetamines and a month's supply of barbituates for Gregory Carlton. The agent returned before the month was complete and asked for more of the same medications, claiming that he had given some to friends at Louisiana State University at New Orleans who needed them to prepare for examinations. Dr. Fisher admonished the patient that the drugs were for his own use and that he was not to give them to anyone else. Cazanavette was very ingenious in devising stories to get Dr. Fisher to give him prescriptions. Cazanavette first told Dr. Fisher that he had gone to L.S.U. and several guys came to him and and asked for some of his medication and, before he knew it, the medicine was gone. Dr. Fisher refused to refill the prescriptions before a month had passed. Two weeks later, Cazanavette returned and was again reminded by Dr. Fisher that he had not waited a month. Cazanavette told Dr. Fisher that he was looking for work out of town and that he would not be back when the month was up. Dr. Fisher prescribed another month's supply and warned the patient not to give any of that medication away. Cazanavette returned several days later and told Dr. Fisher that he had trouble getting the prescriptions filled

and that one store had affixed a sticker to the prescriptions and, in trying to remove the stickers, he had torn the prescriptions. He told Dr. Fisher he had thrown torn prescriptions away and aked Dr. Fisher to write two new ones for him. At first, Dr. Fisher refused to write new prescriptions, but after further conversation relented and wrote two new prescriptions. Cazanavette returned prematurely again and told Dr. Fisher that he had obtained a job on a fishing boat with several other guys and that he was hard-pressed to turn them down when they asked for some of his medication. Dr. Fisher again warned against giving the medication to other people, but wrote two more prescriptions for the agent in his undercover identity. The agent asked Dr. Fisher if he could give him the same amount of drugs in two prescriptions because it was difficult to get a months supply in many places. Dr. Fisher did this. Then the agent went downstairs and handed the prescriptions to another agent and returned to Dr. Fisher's office and told the doctor that a black man grabbed his prescriptions and ran off with them; that he tried to catch the man but he could not. Dr. Fisher wrote two more prescriptions.

John L. Reeves posed as John Richardson. He told Dr. Fisher that he had obtained some amphetamines from Gregory Carlton (Agent Cazanavette) but that Carlton was unable to give him any more. He said he needed the drugs to stay awake in school. Dr. Fisher checked Reeves' blood pressure, heart, height and weight, then prescribed a month's supply of amphetamines and barbituates. Reeves asked for prescriptions for his girlfriend, but Dr. Fisher told him he could not prescribe for anyone he had not seen. Reeves returned early and told Dr. Fisher that his girlfriend had left him, taking his drugs with her. Dr. Fisher cautioned his patient that the drugs were for his personal use and that he was given a thirty-day supply. Believing that the patient's medication had been stolen, however, Dr. Fisher gave him two more prescriptions, this time for milder medications. On his final visit, Agent Reeves told Dr. Fisher he was nearly finished with his final examinations, after which he was returning home to Tennessee. Dr. Fisher wrote these last prescriptions.

William Gray posed as Bill Winnfield. He also told Dr. Fisher he had obtained drugs from Gregory Carlton (Agent Cazanavette) but that he could not get any more from Carlton. He asked Dr. Fisher for

prescriptions to stay awake. Dr. Fisher took Gray's blood pressue, height and weight and prescribed drugs for him. Gray returned a couple of weeks later and asked Dr. Fisher for two new prescriptions. Dr. Fisher gave him the prescriptions. A week later, Gray returned again and told Dr. Fisher he was going out of town and that he would not be back when his prescriptions were due to be refilled. He asked Dr. Fisher for refill prescriptions. Dr. Fisher at first refused, then said he would mail prescriptions to him. Gray returned several days later and said he never got the prescriptions. Dr. Fisher checked the cards and, finding no notation that they had been mailed, wrote two more prescriptions for Gray.

Dr. John Adrianni testified as a medical expert. He had a minor medical practice, having spent the majority of his career in teaching posts at university hospitals. He had taken over someone else's practice for a brief period several years before. He was asked hypothetical questions on the basis of the evidence adduced. To the presecutor's questions, he answered that the giving of prescriptions above mentioned was not in the course of professional practice for a legitimate medical reason. On cross-examination, however, when it became apparent that Dr. Adrianni was equating "bad" practice with the type of conduct purportedly proscribed by the statute, he was asked to separate the two concepts and state whether he thought Dr. Fisher's prescribing practices were outside the scope of professional practice. Dr. Adrianni then testified he felt it was not "good medicine" but that it was in the course of professional practice.

Dr. Bailey, on the other hand, stated that every example of Dr. Fisher's prescribing practices was outside the course of professional practice and not for a legitimate medical purpose. He would not define the standards by which he made the judgement. He merely parrotted the language used by the prosecutor when answering defense counsel's questions.

The defense called its own experts. Each of them testified that because the Federal Government had become so involved in the regulation of prescribing of controlled substances they did not use them any more except where absolutely necessary. They explained that the use of these drugs was not outside the course of professional practice and they felt that the examples given were for legitimate medical purposes. The only reason they did not prescribe these drugs was

because of concern that the Federal Government might try to impute illegal practices to them if they prescribed these drugs.

After the evidence was heard and the jury was instructed on the law, the jury returned a verdict of guilty on all counts of the indictment.

It was discovered after the trial that prior to the trial, Dr. George L. Bailey was a victim of a land fraud scheme and that the perpetrator of that fraud had offered to reimburse Dr. Bailey's $75,000.00 if Dr. Bailey could get the Government to recommend probation for him. The United States Attorney in charge of that case, Mr. James J. O'Conner, refused to recommend probation and the perpetrator refused to make restitution to Dr. Bailey. Dr. Bailey persisted in efforts to get the United States Attorney's Office to reconsider probation for the perpetrator. When the prosecutor of the case in which Dr. Bailey was a complainant learned that Dr. Bailey was to be a Government witness, that prosecutor told the trial prosecutor in this case, Mr. Fonseca, about Dr. Bailey being a complainant. Mr. Fonseca chose to keep quiet and to conceal this informtion from defense counsel. Upon learning after the trial of Dr. Bailey's reasons for testifying as adimantly in favor of the Government as he did, and upon learning that the trial prosecutor had been advised by Mr. O'Connor of this information which might affect the credibility of Dr. Bailey, defense counsel filed motion for a new trial, alleging that the prosecutor had violated *Giglio v. United States*, 405 U.S. 150 (1972). At the hearing on the motion, it was stipulated that (1) Dr. George L. Bailey had been victim of a swindle which was then being prosecuted by the United States, (2) Mr. O'Connor had so advised Mr. Fonseca, and (3) Mr. Fonseca did not communicate this potential impeaching evidence to defense counsel. Without written reasons therefore, the Trial Court denied Dr. Fisher's motion for a new trial.

The court of Appeals for the Fifth Circuit apparently ignored the *Giglio* issue presented by this appeal, even though almost all the oral argument was directed to this issue. The petitioner conceded in oral argument that any change to be made in *United States vs Moore*, _____ U.S. _____, 96 S.Ct. 335 (1975), would have to come from this Court. The Court of Appeals affirmed the Trial Court judgment without a written opinion, citing only the *Moore* case and Fifth Circuit Rule 21.

Reasons for Granting the Writ

I.

The Court of Appeals has so Far Departed From The Accepted and Usual Course of Judicial Proceedings as to Call For and Exercise of This Court's Power of Supervision.

Petitioner presented seven issues on the appeal to the Fifth Circuit. The Court of Appeals, after hearing lengthly argument on the issue presented by petitioner's motion for a new trial based on this Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972), ignored that issue entirely in the *Per Curiam* affirmance without opinion, The opinion below simply stated:

PER CIRIAM: AFFIRMED. See Local Rule 21. See United States v. Moore, _____ U.S., 96 S. Ct. 335 (1975) (Footnote omitted.)

In this case, there was a stupulation between th parties that Mr. Ronald Fonseca, the trial prosecutor, had been told by Mr. James O'Connor, another Federal prosecutor, that Dr. George L. Bailey was a complainant in a case in which a man named Pilotte had swindled the doctor of $75,000.00. It was further stipulated that Mr. Fonseca did not communicate this information to Dr. Fisher or his counsel, for the reasons which appear in Part II of this Section of this Petition for a Writ of Certiorari, we respectfully submit there was an error of law presented to the Appellate Court and this case should not have been affirmed without opinion. In effect, by disregarding this issue of appeal and basing its opinion upon this Court's decision in *United States v. Moore, supra*, we respectfully submit that Petitioner was denied an appeal on these other issues. That is a substantial departure from the accepted and ususal course of judicial proceedings which should call for exercise of the supervisory power of this Court to review this case on petition for certiorari.

II.

The Court of Appeals Has Decided This Case in a Manner Which Conflicts with Applicable Decisions of This Court

In *United States v. Prout*, 526 F. 2d 380 (5 Cir., 1976), the Fifth Circuit Court of Appeals discussed the situations in which this Court's decision in *Giglio v. United States, supra*, would require a new trial. The factors the Fifth Circuit recognized to require a new trial, when they coalesce in the same case, are: (1) Whether the information would have "affected" the witness' credibility if presented to a jury; (2) whether the reliability of the witness might have been determinative of the defendant's guilt; and (3) whether the Government has failed to disclose such evidence. We respectfully submit that those factoral coalesce in this case and should have required a new trial for petitioner.

Both defense experts testified that Dr. Fisher's prescriptions were issued in the course of professional practice. Dr. Adrianni, a Government expert witness, would not testify that Dr. Fisher acted outside the course of professional practice; he only testified that Dr. Fisher did not practice "good" medicine. Only Dr Bailey testified unequivocally that Dr. Fisher's prescriptions issuing was outside the course of professional practice. It was the single most damaging opinion evidence in the case. With Dr. Adrianni testifying only that Dr. Fisher did not engage in "good" medical practice by prescribing amphetamines and barbiturates as he did --- Dr. Fisher was not on trial for not practicing "good medicine" --- and the defense experts testifying that Dr. Fisher's prescriptions had been issued in the course of a legitimate medical practice, the jury most certainly would have been impressed with evidence that the only witness who expressed the opinion that Dr. Fisher's conduct was outside the course of professional practice came from a man who had once gone to the Government attorneys to seek aid in obtaining restitution of his money and who might have harbored the hope that, after favorable testimony in this case, he might persuade the Government attorney to change his mind and to aid Dr. Bailey to secure the return of his $75,000.00.

In the course of Dr. Bailey's testimony, counsel asked Dr. Fisher if he and Dr. Bailey were enemies. Dr Fisher did not know him. After Dr Bailey testified, he introduced his wife to defense counsel. It then seemed strange to counsel that Dr. Bailey would have had his wife

present to observe Dr. Bailey destroy a reputable surgeon and physician in the community. When Dr. Bailey's (and his wife's real interest in testifying as he did surfaced with the disclosure of the information that he did obtain a promise of restitution from Pilotte in the event that Dr. Bailey could persuade the United States Attorney to recommend a suspended sentence for Pilotte in the case involving the swindle of Dr. Bailey, it became clear why Mrs. Bailey was at the trial to observe her husband's testimony. She, as did Dr. Bailey, recognized that the only hope to get the Government to assist them in the recovery of their money was for Dr. Bailey to give them someone they wanted even worse than it appeared they wanted Pilotte.

When Mr. James J. O'Connor, Assistant United States Attorney, realized the significance of Dr. Bailey's relationship with the Government, he informed Mr. Ronald Fonseca. Mr. Fonseca admits that Mr. O'Connor told him that Dr. Bailey was a vitim of Pilotte, but denies that Mr. O'Connor told him any of the details which would have made the fact of Dr. Bailey's relationship with the Government of any greater significance than would be the ordinary relationship between the Government and a victim. It is one respectful opinion, that since the facts triggered the opinion of Mr. O'Conner that the relationship of Dr. Bailey with the United States Attorney's Office was *Giglio* information, Mr. Fonseca was under an affirmative duty, if he chose to decline advising defense counsel of this fact, to more thoroughly inquire of Mr. O'Connor, and perhaps Dr. Bailey, too, to ascertain the dealings and expectations possessed by Dr. Bailey in exchange for his favorable testimony against Dr. Fisher. Mr. Fonseca neither inquired further nor advised defense counsel so that this area could be tested on cross-examination, with the result that Dr. Fisher's conviction very likely turned on Dr. Bailey's testimony which was obviously slanted in order to curry favor with Mr. O'Connor.

The factors gleaned from *Giglio* by the Fifth Circuit in th *Prout* case were each satisfied in this case. There was nondisclosure. Dr. Bailey was a "key" witness for the Government. And a lack of the available impeaching evidence could have affected the jury and caused it to credit Dr. Bailey's testimony when, if it had known of the Pilotte situation, it might reasonably not have done so.

Dealing with an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), this Court recently said in *United States v. Agurs*, _____ U.S. _____, 96 S. Ct. 2392, 2400: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." We do not here impugn the character of the prosecutor. Rather, we urge that the evidence was of such a vital nature to the assessment of the credibility of Dr. Bailey's opinion that the petitioner was denied a fair trial without it.

While the prosecutor here might not have known all the details which triggered Mr. O'Connor's duty to disclose to Mr. Fonseca the potential use of the information about Dr. Bailey under the mandate of *Giglio v. United States, supra,* that was not necessary. The details in the *Giglio* case were supposedly unknown to the prosecuting attorney. This Court reversed the judgment and granted a new trial on the ground that the witness did not fully disclose evidence affecting his credibility and neither did the prosecutor. That is precisely what this case presents and petitioner should be accorded similar relief.

III.

This Court's Decision in *United States v. Moore*, _____ U.S. _____ 96 S. Ct. 335 (1975), Should Be Reconsidered in the Light of the Expert Testimony in This Case, and the Application of 21 U.S.C. Sec. 841 (a)(1) to Doctors Whose Practice of Physicians in Private Practice Should be Restrained in the Absence of Clear Advance Warning Their Conduct Would Subsequently be Considered to be Criminal.

To begin with, Dr. Fisher does not claim it was necessarily "good medicine" that he practiced when he wrote the prescriptions with which this case involved. But he is not on trial for practicing "bad medicine" --- he is on trial for prescribing drugs outside the course of professional practice for illegitimate medical purposes. We submit that the fact that Dr. Adrianni, the Chairman of the American Medical Association's Counsel on Drugs, a consultant for fourteen years to the Federal Food and Drug Administration, and a former Chairman for

four years and a member of the advisory committee to the Food and Drug Administration which recommends the proper limitations upon the use of controlled substances, could not say that Dr. Fisher's prescription writing was outside the course of professional practice points up the vagueness of the statuatory standarts for determining what is and what is not outside the course of professional practice. There may very well be as many separate opinions as there doctors and lawyers.

We know this Court earnestly and carefully considered this question in *United States v. Moore, supra,* and reached the opinion that doctors are fairly persecutable for prescribing controlled substances in some cases. While it is understandable that the statutory scheme, as written, could not be reasonably construed to immunize physicians from prosecution under 21 U.S.C. Sec. 841 (a)(1) where they sold prescriptions or where the giving of prescriptions occurred in something less than a professional surrounding with the employment of examination techniques and the utilization of judgment to assess a patient's needs and the medical propriety of usnig stimulant or depressant drugs, we sincerely feel that, at least until this Court's decision in *United States v. Moore, supra,* that a physician did not have due notice that his conduct violated the statute.

It is a cardinal principle of interpreting criminal statutes that a statute, in order to be valid, must be written so that men of ordinary intelligence need not guess at its meaning nor differ as to its application. *Winters v. New York*, 333 U.S. 507, 518 (1948); *Connally v. General Const. Co.*, U.S. 385, 391 (1925). In *United States v. Moore, supra,* however, this Court departed from that principle and relied instead upon the following excerpt from *United States v. Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction (of criminal statutes(is not an inexorable command to override common sense and evident statutory purpose. *** Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

No explanation was given by this Court why, in the *Moore* case, it was appropriate to follow the language above quoted. This Court, in *Moore*, recognized that the statute at issue is not precise in its application to

physicians, but made it applicable to them on the basis that Congress would not have intended for physicians who are drug pushers to escape the consequences of such conduct. 96 S. Ct. at 344, 46 L. Ed. 2d at 346. This Court there recognized that 21 U.S.C. Sec. 841 (a)(1) does not spell out the limitation upon prescribing drugs unambiguously as did the former Harrison Anti-Narcotic Act, Section 2, 38 Stat. 785, formerly 42 U.S.C. Sec. 298 *et seq*, which defined the physician's exemption as applying to "the dispensing or distribution of any aboresaid drugs to a patient by a physician, *** registered under this Act in the course of his professional practice *only*." In *United States v. Jobe*, 487 F. 2d 268, 269 (10 Cir. 1973), the Court recognized that "the statute is not a model of clarity." In *United States v. Collier*, 478 F. 2d 268, 271-272 (5 Cir. 1973), the Court stated that a physician is "expected to prescribe or dispense drugs within the bounds of his professional practice," and that "(w)hat constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances." The problem with a statute of the nature here in issue is that the law must "command," not "expect," a physician to stay within certain boundaries and those boundaries must be made clear in advance, not when the physician is put on trial and subjected to a standardless judgment by lay persons who are neither trained in the proper boundaries nor legally instructed what those boundaries are. The problem with such a legal approach is that, when applied to the case in which the determination is made, it works as an *ex post facto* law. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964). The definition of a crime cannot be made to depend upon the subjective judgment of ill prepared jurors. The law must define crime.

The law does not have to denounce every conceivable species of an offense, but if there is an apparent exception to the application of the statute, each element essential to the determination when the exception no longer applies must be set forth. *Cf. United States v. Cardiff*, 344 U.S. 174, 176 (1952). That is the problem with the entire statuatory schemes under the Control and Enforcement subchapter of Chapter 13, Title 21, United States Code. Section 822(b) authorizes the

distribution or dispensing of drugs *to the extent of the physician's registration* so long as done in conformity with other provisions of the subchapter. Section 841 (a)(1) makes the acts here a crime when done by a non-registered person, but provides an exception upon which one could reasonably believe and put reliance upon Sec. 822(b) that physicians are allowed to prescribe them. Section 802 (20) is not helpful, either. By highlighting paragraph (b) of 21 U.S.C. Sec. 822 with the title, "Authorized activities," and by stating that the acts listed in Sec. 841 (a)(1) applies to them. Section 822 (b) authorizes doctors to prescribe drugs "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." If Sec. 822 conformity with the other provisions of this subchapter." If Sec. 841 (a)(1) is to be made the basis of a prosecution of a physician, it should not be on the reasoning that it provides a limitation on Sec. 822(b), for Sec. 841 (a)(1) itself relies upon exceptions. The entire statutory scheme is unclear where physicians are concerned, unless physicians are considered to be controlled by Sec. 842 and 843, except when their conduct bears no semblance of professional practice. The stature does not clearly define the limitations upon the exception to Sec. 841 (a)(1). That, in the face of an apparent authorization in Sec. 822 (b), renders the statute void for vagueness so far as the application to physicians is concerned. *United States v. Cardiff, supra.*

"(t)he

Conclusion

For foregoing reasons, this Court should grant this petition and, upon reviewing this case, it should reverse the judgement below.

Respectfully submitted,

Peter J. Abadie, Jr.
by Robert B. Merlin

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CERTIFICATE OF SERVICE

I, Peter J. Abadie, Jr., attorney for William Fisher, M.D., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1976, I served copies of the foregoing Jurisdictional Statement on the parties thereto, as follows:

On the Solicitor General of the United States, by mailing a copy in a duly addressed envelope, air mail postage prepaid, to his office in the Justice Department, Washington, D.C.

All parties required to be served have been served.

Peter J. Abadie, Jr.
by Robert B. Mantle

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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 75-4378

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

WILLIAM FISHER, M.D.,
Defendant-Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana

(September 29, 1976)

Before GOLDBERG, SIMPSON and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/
See United States v. Moore, ____ U.S. ____, 96 S.Ct. 335 (1975).

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.

Appendix B

[Fifth Circuit Letterhead]

TO ALL COUNSEL OF RECORD

NO. 75-4378 - USA v. William Fisher, M.D.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor the Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By S Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. James A. McPherson
Ms. Mary Williams Cazalas

Appendix C

Minute Entry
October 23, 1975
Cassibry, J.

UNITED STATES OF AMERICA

versus

WILLIAM FISHER, M.D. SECTION "G"
CRIMINAL NO. 74-606

This cause came on for hearinf on September 10, 1975 on motion defendant for judgment of acquittal after discharge of jury, or alternatively motion for a new trial, and on motion of defendant for new trial due to government withholding information affecting the credibility of Dr. George L. Bailey, was argued by counsel for both sides, at which time counsel for defendant abandoned his first motion, and the matter was submitted on defendant's second motion.

Whereupon, and after due consideration thereof;

IT IS ORDERED that the motion by defendant for new trial due to government withholding information affecting credibility of Dr. George L. Bailey be, and it is hereby, DENIED.

UNITED STATES DISTRICT JUDGE

Ronald A. Fonseca, Esq.

James A. McPherson, Esq.

Appendix D

No Hiatus

Appendix E

[Fifth Circuit Letterhead]

December 9, 1976

Mr. Nelson B. Jones
Mr. Nelson B. Jones, Clerk
U.S. District Court
U.S. Courthouse
500 Camp St., Rm. C-152
New Orleans, LA 70130

No. 75-4378 - U.S.A. v William Fisher, M.D.

(District Court No. CR-74-505-G-(E))

Dear Sir:

* * *

(X) Enclosed is a certified copy of the Rule 21 Decision in the above case issued for the mandate.

* * *

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your officxe, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

* * *

(X) Original record on appeal or review. 2 volumes & 1 supplemental.

(X) Original exhibits.

* * *

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By S Mary Barb Breaux
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. James A. McPherson
Ms. Mary Williams Cazalas

Appendix F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-4378

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

WILLIAM FISHER, M.D.
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

ORDER:

(XX) The motion of appellant for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

* * *

/S/ THOMAS GIBBS GEE

UNITED STATES CIRCUIT JUDGE

Supreme Court, U. S.
FILED
FEB 16 1977
MICHAEL RODAK, JR., CLERK

No. 76-913

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM FISHER, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-913

WILLIAM FISHER, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is noted at 540 F. 2d 1083.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1976. A petition for rehearing with suggestion of rehearing *en banc* was denied on December 1, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on December 31, 1976. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor improperly failed to inform petitioner of evidence allegedly relevant to the credibility of a government witness.

2. Whether 21 U.S.C. 841(a)(1) is unconstitutionally vague.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of 23 counts charging distribution of controlled substances, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of three years' imprisonment, with all but 60 days of the term suspended in favor of 34 months' supervisory probation, to be followed by two years' special parole pursuant to 21 U.S.C. 841(b)(1)(B). He was also fined $10,000 on each of the first five counts. Petitioner was further ordered to close his office and surrender his license to practice medicine as well as his narcotics permit.

After petitioner's conviction, he made a motion for a new trial based upon the alleged failure of the United States to disclose information relevant to the credibility of one of its witnesses. Following a hearing,[1] the district court denied the motion (Pet. App. 3a). The court of appeals affirmed *per curiam* (Pet. App. 1a).

Briefly, the evidence at trial showed that between April 2, 1974, and June 18, 1974, petitioner wrote 23 prescriptions for various amphetamines and other controlled substances (*e.g.*, Tr. 141-146, 184-187, 209-210). The prescriptions were requested by three undercover agents of the Drug Enforcement Administration. The agents, who met separately with petitioner, stated initially that they wanted drugs to stay awake, go to sleep, or for friends (*e.g.*, Tr. 142-144, 185, 209-210). Petitioner conducted cursory physical examinations of the agents, measuring only their height, weight, and blood pressure (Tr. 143, 187, 210). After the initial office visits, petitioner

[1] We are lodging a transcript of the hearing on the motion for a new trial ("Hearing Tr.") with the Clerk of this Court.

made no further physical examinations (Tr. 157, 195-196, 217). The agents were not asked about their health, nor did they state that they were suffering from any illness (Tr. 157-158, 196, 217-218).

Two expert witnesses, Dr. John Andrianni and Dr. George Bailey, testified that petitioner prescribed a substantially greater quantity of drugs during the period involved than could be used for any legitimate medical purposes (Tr. 257-258, 270-272, 278, 338-340, 345-346). In their opinion, petitioner's conduct fell outside legitimate medical practice (Tr. 248-279, 334-351, 357). Two doctors testified as experts on petitioner's behalf that petitioner's conduct was within the course of professional practice (Tr. 380-384, 437-438, 447-449).

ARGUMENT

1. Petitioner claims (Pet. 10-12) that the prosecutor improperly failed to disclose evidence affecting the credibility of one of its expert witnesses, Dr. Bailey. Prior to petitioner's trial, Bailey was the victim in a land fraud scheme for which one Robert Pilotte was federally prosecuted in the Eastern District of Louisiana. Pilotte had informed Bailey that he would make restitution of the amount defrauded, if the fraud charges were dismissed. Bailey communicated that information to Assistant United States Attorney James O'Connor, who informed Bailey that the prosecution would not be dismissed. Shortly thereafter, Bailey was contacted with regard to his testimony in the present case, which was prosecuted by Assistant United States Attorney Ronald Fonseca. Pilotte pleaded guilty to the fraud charges more than two weeks prior to petitioner's trial and was sentenced to a term of 30 months' imprisonment. *United States* v. *Pilotte*, No. 74-393(D) (E.D. La.), filed July 14, 1975.

Petitioner claims that Dr. Bailey had an interest in testifying favorably for the government in the hope of

influencing the United States Attorney's decision-making in Pilotte's case. Petitioner's factual claim is without substance. Pilotte's offer to Bailey depended upon dismissal of the fraud charges (Hearing Tr. 14). Not only were the charges not dismissed, but Pilotte pleaded guilty prior to petitioner's trial. Whatever interest Bailey might have had in pleasing the prosecutors expired weeks before he testified against petitioner. Because the *Pilotte* matter could not have been affected by Bailey's testimony, the prosecutor had no duty to disclose Bailey's dealings with Pilotte, which did not constitute material exculpatory evidence. See *United States* v. *Agurs*, No. 75-491, decided June 24, 1976; *Brady* v. *Maryland*, 373 U.S. 83, 87.

For the first time, petitioner now claims (Pet. 8, 11) that Pilotte made an additional offer to Bailey that restitution would be made if Bailey persuaded the United States Attorney to recommend probation for Pilotte. Petitioner argues that *Giglio* v. *United States*, 405 U.S. 150, required the United States Attorney to disclose this interest. We are unable, however, to find any evidence in the record supporting petitioner's present description of Pilotte's offer to Bailey, and petitioner cites nothing. In fact, at the post-trial hearing into this matter (when Bailey apparently was available and could have been, but was not, called to testify regarding the subject) petitioner's counsel proposed a stipulation regarding Bailey's testimony to the effect that Pilotte told Bailey "that if Dr. Baley [sic] exerted his influence on the U.S. Attorney's Office to drop the charges Mr. Pillot [sic] would make restitution" (Hearing Tr. 15). There was no suggestion that Pilotte was continuing to exert pressure on Bailey to intervene with the prosecutors at the time of petitioner's trial, when Pilotte already stood convicted, or that his pressure ever extended to matters of sentencing, or, if

it did, that the prosecutors were aware of that fact. Thus, there is plainly no basis for review of this unsubstantiated claim in this Court.

Moreover, while the matter would of course be one for determination by the district court in the first instance, it is hard to see how petitioner would be entitled to a new trial even if his present factual assertions could be substantiated. Unlike *Giglio*, this case involved no false testimony of any kind by the prosecution's witness, Dr. Bailey. And Bailey's testimony, while no doubt of importance, was not critical to the government's case, as was that of the witness in *Giglio*. The facts of the drug distributions were established by the testimony of the narcotics agents involved, and Bailey's expert opinion testimony was duplicated by that of another expert medical witness. Under the circumstances, it is difficult to see how the petitioner's speculations about the marginally impeaching information regarding dealings between Pilotte and Bailey could be found to create "a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, *supra*, slip op. 15.

2. Petitioner further alleges that Section 401(a)(1) of the Controlled Substances Act, 84 Stat. 1242, 1260, 21 U.S.C. 841(a)(1), is unconstitutionally vague when applied to registered physicians. He urges that the statute does not give notice to a physician as to which conduct will fall outside "the course of professional practice." 21 U.S.C. 802(20). The claim, however, is merely "another statement of * * * [the] contention that Congress did not intend that doctors registered under [the Controlled Substances Act] * * * should be punished under Section 841." *United States* v. *Rosenberg*, 515 F. 2d 190, 193 (C.A. 9), certiorari denied, 423 U.S. 1031. This issue was resolved adversely to petitioner's position by this Court in *United States* v. *Moore*, 423 U.S. 122, and no reason exists to reconsider that decision now.

In any event, the requirement that registered doctors prescribe drugs only in the course of legitimate medical practice is not impermissibly vague. *United States* v. *Rosenberg, supra*, 515 F. 2d at 197-198; *United States* v. *Collier*, 478 F. 2d 268, 271-272 (C.A. 5). Whether particular treatments fall within the "course of professional practice" is a judgment routinely required of physicians. See *Doe* v. *Bolton*, 410 U.S. 179, 191-192; *United States* v. *Vuitch*, 402 U.S. 62, 71-72.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys.

FEBRUARY 1977.